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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 416.

UNITED STATES OF AMERICA,
Petitioner,

v.

BERTELSEN & PETERSEN ENGINEERING COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT.

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No. 416.

UNITED STATES OF AMERICA, PETITIONER,
v.
BERTELSEN & PETERSEN ENGINEERING COMPANY.

BRIEF FOR THE RESPONDENT.

JURISDICTION OF THIS COURT.

This case is before this Court on a petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit which affirmed a decision of the United States District Court for the District of Massachusetts in favor of the respondent. The petition was timely filed under *Section* 240 (a) *of the Judicial Code, as amended* and was granted on November 21, 1938. The sole ground upon which the petition is based is the contention (1) that the District Court did not have jurisdiction of the case and (2) that the Circuit Court of Appeals erred in affirming the decision of that Court.

OPINIONS OF THE COURTS BELOW.

The various opinions of the courts below are reported as follows:

Opinion of the District Court, Brewster, J. (R. Vol. I, pp. 40-45) ordering judgment for petitioner, respondent herein, for $44.07; reported in 49 F. (2d) 395;

Opinion of the Circuit Court of Appeals, Morton, J. (R. Vol. II, pp. 4–9) vacating judgment of the District Court and remanding case for further proceedings; reported in 60 F. (2d) 745;

Opinion of the District Court, Sweeney, J. (R. Vol. II, pp. 16–23) ordering judgment for petitioner, respondent herein, for $34,555.68 with interest; reported in 14 F. Supp. 868;

Opinion of the Circuit Court of Appeals, Wilson, J. (R. Vol. II, pp. 65–68) affirming judgment of the District Court; reported in 95 F. (2d) 867; and

Opinion of the Circuit Court of Appeals on Rehearing, Wilson J. (R. Vol. II, pp. 75–78) reaffirming judgment of the District Court; reported in 98 F. (2d) 132.

STATEMENT OF THE CASE.

This suit was brought by the respondent, as petitioner below, in the United States District Court for the District of Massachusetts under *Section* 24 (20) *of the Judicial Code as amended by the Act of* February 24, 1925; c. 309, 43 Stat. 972; 28 U. S. C. 41 (20), sometimes referred to as *"The Tucker Act"*

The purpose of the suit was and is to recover the sum of $34,555.68 which was wrongfully and illegally collected by the Collector of Internal Revenue at Boston, Massachusetts, on account of the respondent's income, excess-profits and war-profits taxes for the year 1917 and wrongfully and illegally credited by the Collector or the Commissioner of Internal Revenue against taxes alleged to be due from the respondent for the year 1918. No notice was given the respondent and no assessment of the alleged tax liability for the year 1918 was made until after the assessment and collection of any such taxes for the year 1918 were barred by the applicable statutes of limitation and such credits are expressly declared to be "void" by *Section* 609 *of the Revenue Act of* 1928 (p. 54, *infra*). The Commissioner of In-

ternal Revenue disallowed the respondent's claim for refund which had been timely filed for the year 1917, to the extent of the $34,555.68, on the sole ground that the credit of that sum against the alleged underpayment or deficiency of the respondent's taxes for the year 1918 had been made within the applicable period of limitation, as extended by waivers (R. Vol. II, p. 16).

The original petition in the suit was filed on September 19, 1929 (R. Vol. I, p. 1) and contains specific allegations to the effect that, before the suit was brought, (1) timely and proper claims for refund had been filed, both with respect to the year 1917 and the year 1918, as required by *Section* 3228 *of the United States Revised Statutes* (p. 52, *infra*), (2) that the suit was begun within two years after "the disallowance of the part of the claim ($34,555.68) to which such suit or proceeding relates", as required by *Section* 3226 *of the United States Revised Statutes* (p. 52, *infra*), and (3) that all "other action requisite to this suit have been duly made and filed in due season".

The fact of the wrongful and illegal collection of the $34,555.68 was clearly established and evidenced at the trial (1) by the admissions of the Government in open Court (2) by an official Certificate of Overassessment (R. Vol. I, pp. 23–24) which has never been impeached by the Commissioner of Internal Revenue and (3) by other evidence which appears in the record or which could have been offered in evidence if the Government had not admitted all of the facts necessary to sustain the jurisdiction of the District Court.

THE STATUTES INVOLVED.

The statutes involved, the pertinent parts of which are either set forth in the argument below or in the appendix hereto, are as follows:

Act of March 3, 1887, c. 359, 24 Stat. 506,
Section 5; 28 U. S. C. 762.
Section 6; 28 U. S. C. 763.

United States Judicial Code, as amended,
Section 24 (5); 25 U. S. C. 41 (5); 36 Stat. 1092.
Section 24 (20); 28 U. S. C. 41 (20); 43 Stat. 972.

United States Revised Statutes, as amended,
Section 3226; 26 U. S. C. 156.
Section 3228; 26 U. S. C. 157.

Revenue Act of 1921, 42 Stat. 227,
Section 250 (d)

Revenue Act of 1924, 43 Stat. 253,
Section 277 (a) (2).
Section 278 (c).

Revenue Act of 1928, 45 Stat. 874,
Section 607; 26 U. S. C. 1670.
Section 609; 26 U. S. C. 1675.

THE ISSUES INVOLVED.

The Government's appeal to this Court raises the following issues:

I. WHETHER THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT AT THE TIME THE ORIGINAL PETITION IN THIS SUIT WAS FILED, THE SAME KIND OF A SUIT OR THE SAME FORM OF ACTION COULD HAVE BEEN BROUGHT AND MAINTAINED AGAINST THE COLLECTOR OF INTERNAL REVENUE, TO WHOM THE RESPONDENT PAID ITS TAXES FOR THE YEAR 1917.

II. WHETHER THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE RESPONDENT FILED A TIMELY AND PROPER CLAIM FOR REFUND FOR THE YEAR 1917 AND BROUGHT THE SUIT WITHIN TWO YEARS THEREAFTER, AS REQUIRED BY SEC-

TION 3228 AND SECTION 3226 OF THE UNITED STATES REVISED STATUTES, RESPECTIVELY.

III. WHETHER THIS COURT SHOULD HOLD AND RULE THAT WHENEVER A COLLECTOR OF INTERNAL REVENUE MAKES A WRONGFUL AND EXCESSIVE COLLECTION OF A TAX FOR ONE YEAR AND THE COMMISSIONER OF INTERNAL REVENUE WRONGFULLY CREDITS THAT SUM AGAINST AN OUTLAWED TAX FOR ANOTHER YEAR, WITHOUT THE TAXPAYER'S CONSENT, THEN AND IN THAT EVENT THE TAXPAYER'S ONLY REMEDY IS A SUIT FOR SUCH SUM AS A TAX FOR THE YEAR TO WHICH THE CREDIT IS MADE.

IV. WHETHER, AS A MATTER OF LAW, EQUITY AND GOOD CONSCIENCE, THE GOVERNMENT WAIVED THE RIGHT TO RAISE ITS SO-CALLED JURISDICTIONAL OBJECTION IN THE APPELLATE COURTS BY VIRTUE OF THE FACT THAT IT APPEARED, PLEADED, AND EXPRESSLY ADMITTED ALL OF THE FACTS NECESSARY TO SUSTAIN THE JURISDICTION OF THE DISTRICT COURT.

ARGUMENT.

GENERAL STATEMENT.

Obviously, the Government's whole objection to the jurisdiction of the District Court is based upon the interpretation put upon *Section* 24 (20) *of the Judicial Code, as amended, supra,* by this Court in the recent decision of *Lowe Brothers Company* v. *United States,* 304 U. S. 302; 58 S. Ct. 897 and some of the recent decisions of the various Circuit Courts of Appeal. Under these decisions it is contended that the Court of Claims had exclusive jurisdiction of this suit. The objection was never pleaded and the question was raised for the first time at the second hearing in the Circuit Court of Appeals. On the contrary, the Government's answer (R. Vol. I, p. 3) *expressly admits the jurisdiction of the District Court and all of the necessary jurisdictional facts as alleged in the petition* (R. Vol. I, pp. 1–3).

Either purposeful or otherwise, it was not until February 18, 1937, when the "Defendant's Assignment of Errors" (R. Vol. II, p. 62) was filed at the second hearing before the Circuit Court of Appeals that any such objection was raised. At that time the six-year period of limitation for bringing a suit in the Court of Claims had expired. It is not enough to say that the respondent was thus taken completely by surprise. The respondent was completely misled, deceived by the admissions contained in the Government's answer, by other admissions made in open court, and by its assent to the bill of exceptions which states (R. Vol. II, p. 13) that "*all requisite conditions precedent to the bringing of its petition were complied with by the petitioner*".

A careful analysis of the various grounds upon which the Government bases its so-called jurisdictional objection will reveal that all of them are matters of fact which could have been set forth by an amendment to its answer, a demurrer, a motion to dismiss or some other appropriate pleading. None of them tend to show that the District Court did not have inherent jurisdiction of the subject matter of the suit. All of them are in their nature susceptible of proof or disproof.

Moreover, in all of these unpleaded, dilatory and piecemeal attacks upon the jurisdiction of the District Court, the Government has constantly shifted its ground from one position to another with the result that this litigation has been greatly delayed, the respondent has been put to enormous expense and an unconscionable burden has been imposed both upon the respondent and upon all of the courts below.

When the objection was first raised at the second hearing in the Circuit Court of Appeals, the sole argument of the Government was to the effect that this suit must necessarily be considered as having been brought to recover the $34,555.68 "as a tax for the year 1918" and that the District Court did not have jurisdiction of such a suit because the

1918 tax was "collected" by the Commissioner of Internal Revenue by way of a credit and not by a Collector of Internal Revenue, as was held in *Reeves Brothers Company* v. *United States* (C. C. A. 6th) 83 F. (2d) 121; certiorari denied 299 U. S. 573; 57 S. Ct. 37.

At the rehearing in the Circuit Court of Appeals, the Government completely abandoned its contention that the suit was brought to recover a 1918 tax, and insisted that the suit was brought either (1) on the Certificate of Overassessment as an "account stated" or (2) for the recovery of an "allowed overpayment" of the 1917 tax, and that the Circuit Court of Appeals in its opinion (R. Vol. II, pp. 65–68) had so held, contrary to the decisions of the Circuit Court of Appeals for the Second Circuit in the cases of *Moses* v. *United States* (C. C. A. 2d) 61 F. (2d) 791; certiorari denied 289 U. S. 743; 53 S. Ct. 689 and *Lowe Brothers Company* v. *United States* (C. C. A. 6th) 92 F. (2d) 905, affirmed 304 U. S. 302, 58 S. Ct. 896.

In this Court, both in the petition for the writ of certiorari and its brief, the Government does not strongly rely upon any of the arguments urged below but bases its attack upon the jurisdiction of the District Court on a variety of entirely new grounds none of which were relied upon in the courts below, among which are the following:

(1) That the suit is based on the Commissioner's refusal to allow a "special assessment claim" or that the ground asserted in the claim for refund upon which the suit is based was that special assessment should be granted under Section 210 of the Revenue Act of 1917, matters which this Court, in the case of *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551; 48 S. Ct. 587, held could not constitute the basis of a suit as they were entirely discretionary with the Commissioner of Internal Revenue.

(2) That the District Court was without jurisdiction as to the year 1917 because "it was not alleged and proved that a claim for refund was filed within four years of the payment of the tax for that year" as required by Section 3228 of the United States Revised Statutes.

(3) That the suit was not brought within two years of the rejection of such claim as required by Section 3228 of the United States Revised Statutes.

(4) That "the Commissioner's final disallowance of the refund of the $34,555.68 within two years of which this suit was brought, did not constitute a disallowance of any portion of an original timely claim" because the grounds asserted in the two claims are different as was held by this Court in the cases of *United States* v. *Andrews*, 302 U. S. 517; 58 S. Ct. 315 and *United States* v. *Garbutt Oil*, 302 U. S. 528; 58 S. Ct. 320.

(5) That "the credit of the allowed overpayment for 1917 against taxes assessed for the year 1918 precludes suit for the year 1917", in any court.

With the foregoing statement as a background, the respondent respectfully submits the following with respect to the four issues presented above:

As to the first issue:

I.

THE CIRCUIT COURT OF APPEALS DID NOT ERR IN HOLDING THAT, AT THE TIME THE ORIGINAL PETITION IN THIS SUIT WAS FILED, THE SAME KIND OF A SUIT OR THE SAME FORM OF ACTION COULD HAVE BEEN BROUGHT AND MAINTAINED AGAINST THE COLLECTOR OF INTERNAL REVENUE TO WHOM THE RESPONDENT PAID ITS TAXES FOR THE YEAR 1917.

First: Upon the allegations of the petition, it is clear that the suit was properly brought to recover the $34,555.68 as a 1917 tax wrongfully collected by the Collector of Internal Revenue.

It is fundamental that the purpose for which any suit is brought, the form of the action and the nature of a taxpayer's claim, must be determined by the allegations of the petition and not by the oral arguments and the briefs of either party. The original petition upon which the instant suit was brought (R. Vol. I, pp. 1–4) was filed on September 19, 1929 and contains, among others, the following express jurisdictional averments:

> "Third. This action is brought against the United States of America in the United States District Court for the District of Massachusetts, said court having jurisdiction of the matters herein complained of by the petitioner.
>
> "Fourth. The said action is one to recover back Federal War profits taxes, excess profits taxes and income taxes plus interest for the taxable periods ended December 31, 1917, or December 31, 1918, as the case may be, both years being sued jointly; which the taxpayer alleges were erroneously and illegally withheld from the said petitioner *or erroneously and illegally collected from the said petitioner* and is an action arising out of the laws of the United States providing for internal revenue.

"Fifth. All returns, payments, claims for refund, and other action requisite to this suit have been duly made and filed in due season, and the claims for refund as to the matters herein complained of have been denied or rejected by the Commissioner of Internal Revenue."

While it is true that the petition does declare in the alternative for the recovery of the sum in controversy as a "1917 tax" or as a "1918 tax", it is obvious that throughout all of the hearings and in all of the courts below the respondent relied upon its right to recover the $34,555.68 as *a wrongful and illegal collection* of the 1917 tax and considered the allegations of the petition with respect to the year 1918 as purely precautionary. The respondent never considered the application of that sum against the alleged taxes for 1918 as a valid collection for that year but insisted that at the time the credit was made it was barred by the five-year period of limitation provided in *Section 250* (d) *of the Revenue Act* of 1921 (p. 53, *infra*) and was expressly declared to be void under *Section 609 of the Revenue Act of* 1928 (p. 54, *infra*). In other words, the respondent *waived* its right to recover the sum in controversy as a 1918 tax and it is clear from all of the opinions that the courts below thus understood the respondent's position.

But, whether the suit be considered as one to recover the $34,555.68 as a 1917 tax or as a 1918 tax the Government has expressly admitted all of the facts necessary to sustain the jurisdiction of the District Court. The Government's answer (R. Vol. I, p. 3) which was filed on October 21, 1929 is as follows:

"Comes now the respondent in the above-entitled action and for answer to the petition filed herein admits each and every allegation in paragraphs First to Eighth, inclusive, of the said petition, . . ."

Moreover, the respondent's bill of exceptions, upon which the case was heard in the Circuit Court of Appeals the first time, was assented to by the Government before its allowance by the Court (R. Vol. I, p. 23) contains the following statements (R. Vol. I, p. 13) with respect to the respondent's full compliance with all of the jurisdictional requirements for the maintenance of this suit as an action to recover a 1917 tax:

> "All requisite conditions precedent to the bringing of its petition were complied with by the petitioner.
>
> "The pleadings are a part of this record and may be referred to as a part of this bill of exceptions.
>
> . . . . . .
>
> "Both at the original hearing and at the rehearing, the case was tried solely upon the pleadings, certain documentary evidence and upon facts agreed to in open court, as hereinafter set forth, . . .
>
> . . . . . .
>
> "At the trial it was agreed by counsel that the taxes which the petitioner paid for the year 1917 were paid on the dates and in the amounts as follows:
>
> \$112,817.39 was paid in April 1, 1918.
> \$100,000.00 was paid on June 17, 1918.
> \$10,000.00 was paid on February 28, 1919.
> \$54,768.84 was paid on August 8, 1919.
> \$6,510.54 was paid on October 14, 1920."

Despite all of the foregoing, which we respectfully submit conclusively shows that the suit was properly brought to recover the \$34,555.68 as a 1917 tax, the Government in its brief (p. 18) states that "the petition does not allege that the tax for 1917 was erroneously or illegally collected". The complete answer to this plain misstatement of the fact is to be found in the Fourth paragraph of the petition (R.

Vol. I, p. 1) which we have quoted above and where it is alleged that the action is one to recover back taxes . . . "which the taxpayer alleges were erroneously and illegally withheld from the said petitioner *or erroneously and illegally collected from the said petitioner*". The words "erroneously and illegally collected" necessarily apply to the year 1917 because the $34,555.68 was never actually "collected" from the petitioner as a 1918 tax. It was paid to and collected by the Collector of Internal Revenue as a 1917 tax.

Second: The District Court has twice found or ruled that this is a suit for the recovery of taxes for the year 1917 and the Circuit Court of Appeals has three times sustained those findings or rulings.

In the first opinion of the District Court (R. Vol. I, p. 40) Judge Brewster found and ruled as follows:

> "In its petition and amended petition the petitioner seeks to recover (a) the balance of an over-payment of 1917 income and profits tax, and (b) an additional sum claimed to be due for interest."

In the first opinion of the Circuit Court of Appeals (R. Vol. II, p. 4) Judge Morton said:

> "This is an action to recover $34,555.68 with interest, constituting part of an admitted over-payment by the plaintiff on its income taxes for 1917."

In the second opinion of the District Court (R. Vol. II, p. 16) Judge Sweeney found and ruled as follows:

> "This is an action at law to recover $34,555.68, with interest, constituting a part of an admitted over-payment by the plaintiff on its income taxes for 1917."

In the second opinion of the Circuit Court of Appeals (R. Vol. II, p. 65) of March 18, 1938, Judge Wilson said:

"This is an action by a taxpayer to recover the sum of $34,555.68 with interest as a part of an overpayment of $91,570.34 for income and excess profits taxes for the year 1917, which overpayment had been allowed by the Commissioner.

. . . . . .

". . . we think in the last analysis it is based on a claim for a balance of the overpayment for the 1917 tax and not for an illegal collection of a 1918 tax."

In the third opinion of the Circuit Court of Appeals on Rehearing (R. Vol. II, p. 78) Judge Wilson said:

"Upon a reconsideration of the facts and the briefs on rehearing, we think this action was brought to recover that part of a claim for refund of the 1917 overpayment which had been disallowed, . . ."

The Government's contention that this suit should or must be considered as an action to recover the $34,555.68 as a 1918 tax is an obvious attempt to bring this case within the decision of this Court in the case of *Lowe Brothers Company* v. *United States, supra.* It is apparent, however, from the foregoing that the two cases are clearly distinguishable on the facts with respect to the tax year for which suit was brought. In the Lowe Brothers case, the suit was based entirely upon the alleged right of the taxpayer to recover in the District Court a 1917 tax which had been collected by way of a credit. If such was the situation in the case at bar, the respondent would admit that the Lowe Brothers Company case is decisive and that the Court below was in error. But, we respectfully submit, that the two cases are entirely distinguishable as was clearly pointed out by Judge Wilson in the opinion on rehearing (R. Vol. II, p. 78) in the following language:

"The case of *Lowe Bros.* v. *United States,* 92 Fed.

(2d) 905, affirmed by the Supreme Court on May 16, 1938, does not militate against the taxpayer's right of recovery in this case, since the tax for the year in question in that case was not collected by a collector who was dead or out of office, as the 1917 tax had been in this case, but was in effect collected by the Commissioner of Internal Revenue by applying an overpayment as a credit on taxes for a prior year, which the Commissioner attempted to do in this case for an alleged deficiency tax for 1918."

Third: This suit is not an action on an account stated nor is it based on an allowed claim.

The Government in its brief (pp. 24–25) makes the following contention:

> "C. The petition attempts to state a cause of action on an allowed claim for 1917, which is not within the jurisdiction of the District Court."

In support of this contention the brief states that the circuit Court of Appeals in its opinion of March 18, 1938 (R. Vol. II, pp. 65–68) held "that the action was to recover part of an overpayment which had been allowed" and that in its opinion after the rehearing (R. Vol. II, pp. 75–78) that Court treated the present suit, in so far as it relates to the year 1917, as one to recover that part of a claim for refund of a 1917 overpayment which had been allowed. In other words, the Government is accusing the Court below of shifting its position just as the Government itself, as we have pointed out above, did in its argument to that Court.

We respectfully submit that all of the language used in the earlier opinion of the Circuit Court of Appeals with reference to the year 1917 was merely used to dispose of the Government's then contention to the effect that the suit must be considered as a suit for the recovery of the 1918 tax and

cannot in justice and in truth be said to mean that the entire action was based on the theory that the Commissioner's Certificate of Overassessment constituted an account stated or on an allowed claim which carried with it the implied promise on the part of the United States to pay. It is obvious that all of the references to the effect that the overpayment for 1917 had been allowed was intended by the Court to mean that the "evidence" in the case clearly established the fact of the excessive collection. The Government completely misconstrues the language in the opinion of the Circuit Court of Appeals when it contends that the language used was a holding with respect to the *whole theory of the case or the form in which the action was brought.* The opinion of the Circuit Court of Appeals on rehearing (R. Vol. II, p. 76) completely clarifies the position of that Court on this issue and states as follows:

> "The certificate of overassessment issued by the Commissioner on July 27, 1926, disclosed an overpayment by the taxpayer of the 1917 tax of $91,570.34, of which the Commissioner ordered refunded to the taxpayer approximately $55,000, and on July 27, 1926, credited $34,555.68 to a deficiency tax for 1918.
>
> "It cannot be said that the certificate of overassessment constituted an account stated between the government and the taxpayer, since the taxpayer refused to assent to the application of any part of the overpayment to a deficiency tax for 1918. To constitute an account stated there must be an agreement as to liability and the amount due. *Goodrich, Adm.* v. *Coffin,* 83 Me. 324. That the taxpayer's petition was not based on an allowance of an overpayment for 1917, and an implied promise by the government to refund, is equally clear, since the taxpayer refused to assent to the application of $34,555.68 to a deficiency tax of 1918. . . ."

Whatever the Government may say about the allegations of the petition, the respondent contends that none of the allegations therein can possibly be construed as meaning that this suit is brought on the theory of an account stated or on an allowed claim. Moreover, as pointed out by the Circuit Court of Appeals, the respondent refused to assent to the adjustments which the Commissioner was proposing to make with respect to its 1917 account. As early as December 30, 1925, the respondent requested the Commissioner to close out its account for the year 1917 on the basis of the Commissioner's determination that there had been an overassessment of $91,570.34 for that year. In denying that request, the Commissioner on January 23, 1926 (R. Vol. I, p. 35) addressed the following letter to the respondent:

> "Sirs: Receipt is acknowledged of your letter dated December 30, 1925, wherein you state that you accept the adjustment indicated in Bureau letter dated September 16, 1925, for the year 1917, resulting in an overassessment of $91,570.34 and request that the 1917 case be closed without waiting for the final determination of your tax liability for the year 1918.
>
> "You are advised that this office is unable to comply with your request for the reason that any additional tax which may be found to be due for the year 1918 will be offset against the overassessment for 1917, and as the final determination of the 1918 case has not yet been made, the 1917 case may not be closed at this time.
>
> . . . . . .

On October 11, 1927, immediately upon receipt of the Certificate of Overassessment and the check in partial payment, the respondent addressed the following letter (R. Vol. I, p. 23) to the Collector of Internal Revenue at Boston, Massachusetts:

"Dear Sir: This is to acknowledge receipt of your check for $87,119.59, which is absolutely accepted under protest, inasmuch as you have applied an outlawed tax for 1918 against our legally allowable refund.

Very truly yours,

BERTELSEN & PETERSEN ENGINEERING CO.
By

"Original of this letter rec'd 10/11/27
THOMAS W. WHITE, Collector.
By J. H. Russell, Deputy."

In the case of *Daube* v. *United States*, 289 U. S. 367; 53 S. Ct. 597, Mr. Justice Cardozo stated the essentials of "an account stated" as follows:

> "If the traditional tests, familiar to the law of contracts, are to be accepted as our guide, there was no account stated between government and taxpayer. No balance was arrived at as the result of computation and agreement. *Volkening* v. *DeGraaf*, 81 N. Y. 268, 271. The Commissioner did not inform the taxpayer that the tax had been overpaid in a determinate amount. The taxpayer did not give assent either expressly or by silence to the outcome of the audit. The essentials of an account stated in any strict or proper sense are lacking altogether. *Toland* v. *Sprague*, 12 Pet. 300, 333, 9 L. Ed. 1093; *Nutt* v. *United States*, 125 U. S. 650, 8 S. Ct. 997, 31 L. Ed. 821; *Volkening* v. *DeGraaf, supra; Newburger-Morris Co.* v. *Talcott*, 219 N. Y. 505, 511, 512, 114 N. E. 846, 3 A. L. R. 287 . . ."

Upon the evidence, therefore, it is clear that all of the requirements of an account stated or of an action based on an allowed claim are lacking in the case at bar and that the respondent did not allege or attempt to prove any such action.

Thus, on the first issue, we have shown (1) that the whole purpose or intent of the suit as revealed by the allegations of the petition, and the proof adduced at the trial, was to recover a wrongful and illegal collection of the respondent's 1917 taxes, *such as could have been brought against the Collector of Internal Revenue, to whom those taxes were paid, if he had still been in office;* (2) that the suit was not intended to be brought for the recovery of the sum in controversy as a 1918 tax, which was collected by way of a credit, as in the case of *Lowe Brothers Company* v. *United States, supra;* (3) that neither the allegations, the proof adduced at the trial nor the findings and rulings of the Court below tend to show that the suit is brought on the theory of an account stated or an allowed claim.

It is respectfully submitted, therefore, that the Circuit Court of Appeals did not err in affirming the decision of the District Court and in its own holding to the effect that this is a suit for the recovery of wrongful and illegally collected taxes for the year 1917 which could have been brought against the Collector of Internal Revenue.

As to the second issue:

II.

THE CIRCUIT COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE RESPONDENT FILED A TIMELY AND PROPER CLAIM FOR REFUND FOR THE YEAR 1917 AND BROUGHT THE SUIT WITHIN TWO YEARS THEREAFTER AS REQUIRED BY SECTION 3228 AND SECTION 3226 OF THE UNITED STATES REVISED STATUTES, RESPECTIVELY.

In view of (1) the admissions contained in the respondent's answer and in open Court to the effect that proper claims for refund had been timely filed and (2) of its assent to the bill of exceptions which stated that *"all requisite conditions precedent to the bringing of its petition were complied with by the petitioner"*, much of the evidence which the respondent, as petitioner-below, could have offered in that

regard and many of the facts upon which the Government is now attempting to base its so-called jurisdictional objection do not appear in this record. However, the respondent did prove through documentary evidence, could have proven, and still is ready, able and willing conclusively to prove that it fully complied with the statutes.

First: As a matter of fact the respondent filed proper and timely claims for refund for the year 1917.

1. The Bertelsen & Petersen Engineering Company, the respondent herein, filed five (5) claims for refund for the year 1917 on Treasury Department Form 843 for specified amounts "or such greater amount as is legally refundable", the dates of filing and the specified amounts of such claims being as follows:

Dates of Filing:	Amount of Claims:
February 28, 1923	$46,715.09
March 12, 1924	$75,000.00
March 31, 1925	$40,000.00
April 25, 1926	$91,570.34
November 28, 1927	$34,555.68

2. The claim of February 28, 1923 set forth as grounds for the allowance thereof the following:

> "Commission selling account disallowed as expense by Field Agent, claimed as necessary business expense; depreciation originally omitted for 1917, now claimed as expense; items charged as expense prior to January 1, 1917 restored as per Articles 840 and 841, and used for invested capital and depreciation;—all as per exhibits mailed to Washington."

3. The claim of March 12, 1924, was accompanied by a brief and stated as grounds for the allowance thereof, the following:

> "All evidence submitted in brief to Washington."

4. The claim of March 31, 1925 set forth as grounds for the allowance thereof the following:

> "All points at issue allowed showing refund except relief herein requested—Section 210—and now being considered."

5. The claim of April 25, 1926, which was filed within the limitation period as extended by waiver, set forth as grounds for the allowance thereof the following:

> "Claim is made for the above indicated amount together with interest thereon from the date paid in accordance with results as set forth in Treasury Department letter dated September 16, 1925, supplemented by sixty day letter the time on which expired April 26, 1926.
>
> "This claim is filed at the present time in order to protect our interests against expiration of limitation period thereon.
>
> "It is requested that claim be immediately forwarded to Washington in order that same may be assigned to auditor in Income Tax Unit, now making a review of our 1918 tax liability."

6. The claim of November 28, 1927, was accompanied by another claim for the same amount for the year 1918, and a brief. The 1917 claim does not appear in this record. But, the 1918 claim, although it was not offered in evidence in the District Court, was put in the Record (R. Vol. II, p. 38) by the Government in order to establish its argument in that Court to the effect that the suit was brought to recover the $34,555.68 as a 1918 tax. The 1918 claim is for $34,555.68 "plus such larger amount as may result plus interest" and states as grounds for its allowance the following:

> "Refund of additional taxes for this year of $34,

555.68, same having been paid out of refund for 1917 thru withholding by your Department. See brief for details."

7. The Commissioner never notified the respondent as to the dates of the rejection or allowance of all of the foregoing claims and the only specific notice which the respondent ever received as to any of the dates of rejection is contained in a memorandum prepared by the Chairman of the Special Committee of the Bureau of Internal Revenue and signed by the Deputy Commissioner, a copy of which was furnished to the respondent, which contains the following statement:

"On November 28, 1927, the taxpayer filed with the Collector of Internal Revenue for its district claims for refund for 1917 and 1918 each for $34,555.68 on the grounds that interest had been erroneously computed and that the additional tax for 1918 had never been assessed but was used as an offset against the overassessment for 1917 after the period of limitation for making assessments as extended by waiver had expired. *The claims were considered on the merits and in Bureau letter dated February 6, 1928, they were proposed for rejection.* The official rejection appeared on schedule No. 11471 dated February 28, 1928. Within two years from the disallowance of said claims, namely, on or about August 28, 1929, a petition was filed with the United States District Court for the District of Massachusetts for the recovery of $34,555.68 and interest thereon which amount was alleged to have been erroneously and illegally withheld (*this allegation applies to 1917*) or erroneously and illegally collected (*this allegation applies to 1918*) from the petitioner." (Italics supplied.)

8. The petition in this suit was filed on September 19,

1929 (R. Vol. I, p. 1) which was clearly within the two-year period as required by Section 3226 of the United States Revised Statutes (p. 52, *infra*).

Second: As a matter of law the respondent, as petitioner below, fully complied with the statutes in so far as the allegations of the petition and the claims for refund are concerned.

Despite its own admissions and all of the foregoing facts with respect to the timely filing of proper claims for refund and the timely bringing of the suit for the $34,555.68, as a 1917 tax, the Government in its brief (p. 11) makes the following clearly unfair and unwarranted statement:

> "The petition is deficient in that it does not allege the filing of a claim for refund within four years of the payment of the tax for 1917, and the bringing of suit within two years of the rejection thereof or within five years of the payment of the tax; . . ."

The complete answer to this contention is that under the applicable statute it is not required that the petition in a suit of this kind must contain such allegation. The *Act of March 3, 1887*, c. 359, Para. 5; 24 Stat. 506; 28 U. S. C. 762, provides as follows:

> "762. PETITION IN SUIT AGAINST UNITED STATES.—The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

Moreover, it is an elementary principle of law and pleading that statutes of limitation are not jurisdictional and must be specially pleaded in the trial Court. If such statutes are not invoked and pleaded in the trial Court they cannot be set up in the Appellate Court under the guise that the trial Court did not have jurisdiction. Obviously, Section 3228, of the United States Revised Statutes, which provides for the filing of the claim for refund within four years after payment of the tax and Section 3226, which provides that suit must be brought within five years after payment or within two years after disallowance of the claim, are both statutes of limitations and the Courts have uniformly held that those statutes are not jurisdictional and must be specially pleaded.

In the case of *Western Wheel Scraper Company* v. *United States*, 72 F. (2d) 487, the Circuit Court of Appeals for the Seventh Circuit held:

> "To sustain its contention that the District Court was without jurisdiction of this cause, the government relies upon a section 3226 of the Revised Statutes (as amended, 26 USCA par. 156). This section provides that, before any taxpayer shall commence suit to recover any internal revenue tax which he believes to have been erroneously or illegally assessed or collected, he must first file a claim for refund with the Commissioner of Internal Revenue and then wait six months unless the Commissioner renders a decision within that time. It is also provided that suit must be brought not later than five years from the date of the payment of the tax or two years after the disallowance of the part of the claim to which the suit relates. As we read this section of the statute, it was intended to save the parties the expense of litigation and give the Commissioner an opportunity to settle controversies before suit is commenced thereon, *not for the purpose of conferring jurisdiction upon the courts.*" (Italics supplied.)

In the case of *Retzer* v. *Wood*, 109 U. S. 185; 3 S. Ct. 164, this Court said:

"The statute of limitations was not pleaded. . . .

. . . . . .

"As to the defense of the statute of limitations, it was not pleaded, nor brought to the attention of the court, as a defense, at the trial. It was not within the issue raised by the plea of the general issue, which was the only issue to which the stipulation for a trial by the court extended. It is well settled that, in the absence of a contrary rule established by statute, a defendant who desires to avail himself of a statute of limitation as a defense must raise the question either in the pleading, or on the trial, or before judgment. *Storm* v. *United States*, 94 U. S. 76, 81; *Upton* v. *McLaughlin*, 105 U. S. 640. . . . When the testimony at the trial closed, and the plaintiff asked for a judgment in his favor, he was entitled to it. It is proper that the circuit court should be directed to enter such a judgment. The conclusion of law, by the circuit court, that the tax was illegally exacted being a correct conclusion, and its conclusion that the suit was barred by limitation being an incorrect conclusion, it follows that the plaintiff was entitled to judgment on the facts found. The special findings of fact were equivalent to a special verdict, and the question thereon was whether they required a judgment for the plaintiff or the defendant. . . ."

In the case of *Upton* v. *McLaughlin*, 105 U. S. 640; 26 L. Ed. 1199 this Court held that the statute of limitations must be raised in the District Court by an appropriate pleading and in the course of the opinion said:

"The question is not to be treated as one of power or

jurisdiction, but as one dependent on the principles applicable to statutes of limitation generally.

"This being so, the record shows that no question as to the application of the statute to the case was raised in the District Court of the Territory by the defendant, either in pleading or on the trial or before judgment. It is too late for a defendant who does not take, prior to a judgment against him, the point that the action is barred by a statute of limitation, to raise the point for the first time in an appellate court. This principle is always applied to questions which are not questions of jurisdiction." (Cases cited.)

We have thus shown, therefore, that the whole contention of the Government in regard to the insufficiency of the allegations of the petition and the proof in regard to the timely and proper filing of claims for refund and the timely bringing of suit thereafter, are clearly untenable (1) because the statute itself does not require that petitions filed under *Section* 24 (20) *of the Judicial Code* must allege compliance with *Section* 3226 and *Section* 3226 *of the United States Revised Statutes,* (2) because both of those sections are statutes of limitations and the Government failed to plead and invoke them in the District Court and (3) because the Government admitted by its answer, in open Court and in the bill of exceptions, that the requirements of those sections had been fully complied with and no further proof of such compliance was necessary.

Third: This suit is not based on a special assessment claim or the Commissioner's refusal to grant special assessment under Section 210 of the Revenue Act of 1917.

The Government in its brief discusses numerous questions such as (1) the tax year to which the suit relates, (2) alleged defects in the allegations of the petition and (3) the failure of the respondent to file timely and proper claims for refund

and to bring the suit within two years thereafter. But, the sole question presented for the decision of this Court both in the petition for the writ or certiorari and in its brief on the merits (p. 2), is stated as follows:

> "Whether the District Court has jurisdiction of a suit against the United States for the year 1917 seeking the recovery of internal revenue taxes in excess of $10,000 where the amount sought to be recovered constitutes a portion of the amount allowed by the Commissioner on a special assessment claim for 1917 which was credited against a barred deficiency for 1918 and where the claim for refund upon which jurisdiction is asserted was filed more than four years after the payment of the 1917 tax."

No such question as this was raised or presented to the Circuit Court of Appeals in any of the hearings or at the rehearing before that Court. The sole purpose of the Government in raising the issue of special assessment for the first time in this Court is to bring the case at bar within the decision in *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551; 48 S. Ct. 587, in which it was held that the matter of special assessment was purely discretionary with the Commissioner of Internal Revenue and that the Commissioner's refusal to grant special assessment could not be made the basis of a suit, as is the case where the Commissioner refuses or disallows an ordinary claim for refund. *The original petition in this case contains no allegation whatsoever with respect to any special assessment claim and the respondent never complained nor does it now complain of any refusal of the Commissioner of Internal Revenue to grant special assessment.* If this issue had been raised in the District Court the contentions of the Government could have been completely disproved.

The Government bases this whole contention in regard to

special assessment upon the language used in the Commissioner's letter of September 16, 1925 (R. Vol. I, pp. 30–33) which does seem to indicate that the $91,570.34 which the Commissioner first proposed to allow for refund of the 1917 tax was determined by way of special assessment. But, the memorandum of the advisory Committee signed by the Deputy Commissioner which is referred to by the Circuit Court of Appeals (R. Vol. II, p. 76) was the final communication which the respondent received as to its special assessment claim states as follows:

> "The claims for refund for 1917 and 1918 based upon special assessment which were proposed for rejection in the sixty-day letter were officially disallowed on schedule No. 7212 dated August 2, 1926."

With respect to the Commissioner's action on the claims for refund the letter (R. Vol. I, p. 32) states as follows:

> "In accordance with the above conclusions, your claims for the refund of $46,715.09 and $75,000.00, aggregating $121,715.09, will be rejected for $30,144.75."

By this letter the respondent's claims were officially rejected *only to the extent of the $30,144.75.* The balance of the claim was neither allowed nor rejected by the letter of September 16, 1925. A part of the balance, however, was paid but the portion of the claims amounting to $34,555.68 was never paid and this portion of these original claims was specifically rejected on "Schedule 11471 dated February 28, 1928". This explicit rejection was the result of the demand for payment of that specific amount by the claim filed on November 28, 1927, as has been stated above.

On the facts, the case at bar, in so far as the Government's contention with respect to a special assessment claim is concerned, is much stronger than that of *Factors & Finance Company* v. *United States* (Ct. Cl.) 56 Fed. (2d) 902; af-

firmed 288 U. S. 289; 53 S. Ct. 287, in which case the taxpayer prevailed. In that case the only claim which the taxpayer filed within the statutory period was a general one without any statement of the grounds for its allowance. After the statute had run an amended claim was filed which "set forth specifically that the refund should be granted for the reason that the profits tax should be computed under the provisions of *Section* 210 *of the Revenue Act* of 1917 and requested the Commissioner to make such computation. The Commissioner disallowed the claim and refused refund solely on the ground that the amendment was filed too late. The Court of Claims overruled the objection of the Government and this Court sustained the decision. In sustaining the contentions of the taxpayer and allowing recovery the Court of Claims, referring to Section 210 of the Act of 1917, among other things, said:

> "So far as a refund by the Commissioner is concerned, these provisions do not require the statement in the claim of the facts or theory upon which the claim is based. He may allow such a claim upon any facts of which he may have knowledge or which he may himself obtain. . . .
>
> . . . . . .
>
> "Thus, the prime purpose of a refund claim is to give the Commissioner jurisdiction over the matter. He may then of his own accord give the taxpayer any relief which he thinks proper."

In affirming the decision of the Court of Claims Mr. Justice Cardozo (53 S. Ct. 287, 289) said:

> "Under section 210 of the Act of 1917, as under section 327 (a) of the Act of 1918, the Commissioner acts of his own motion whenever he is unable to satisfy him-

self that the valuation will be accurate if there is adherence to the statute.

. . . . . .

"This question, if no other, he must have considered and determined when a claim for refund was submitted by the taxpayer without specifying the grounds. *United States* v. *Memphis Oil Co.*, 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619. This question if no other, he must again have considered and determined when he certified to the taxpayer, after the claim had been amended and after submission of the evidence, that section 210 of the Act of 1917 supplied the applicable rule. It is a question that in last analysis is addressed to his own conscience, and, in the absence of any evidence impeaching his conclusion, his certificate of satisfaction or the contrary is binding on the courts.

"The cumulative force of these administrative opportunities and these procedural analogies upholds the claim and the amendment."

If the respondent had intended to base its suit (1) on the Commissioner's refusal to grant a special assessment claim or (2) upon the Commissioner's refusal to pay the amount which he had allowed on a special assessment claim, such a suit must have been brought within two years of August 2, 1926. No such suit was ever thought of or attempted because the respondent well knew that such a suit would clearly be impermissible under the decision of this Court in the case of *Williamsport Wire Rope Company* v. *United States, supra,* and the other cases which have followed in the wake of that decision.

Even if the Commissioner did determine that the respondent's *claims for refund* should be allowed in the amount of $91,570.34 which he had determined to be allowable by resort to *Section* 210 *of the Act of* 1917, the actual

fact of the matter is, as we have already pointed out, that he *officially disallowed the claim for refund* to the extent of $34,555.68 on the official Schedule of Rejected Claims No. 11472 dated February 28, 1928 (R. Vol. II, p. 76) and it is the disallowance or his refusal to refund that amount upon which this suit is based.

In the case of *Ridgway* v. *United States,* 18 Ct. Cl. 707; 4 A.F.T. R. 4915, 4918–4919, Judge Richardson of the Court of Claims said:

> "Until, therefore, the taxes were paid back the action of the Commissioner authorized by the statute was not consummated. . . .
>
> . . . . . .
>
> "It is payment that the statute authorizes him to make, and until payment is made his authority over the matter is not exhausted, unless, perhaps, the claimant should acquire a vested right by bringing suit before revocation, as to which we express no opinion."

It is clear, therefore, (1) that the issues of this case are entirely unrelated to the question of special assessment (2) that the action is based on a statutory claim for refund (3) that the suit was "begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates" as required by *Section 3226 of the United States Revised Statutes* (p. 52, *infra*) and (4) that none of these questions are properly raised in this Court because none of them were pleaded and timely raised in the Courts below.

Fourth: The claim for refund for the year 1917 filed on November 28, 1927, was not a new claim nor was it based on different grounds from those stated in the original timely claim.

In its brief (p. 16) the Government makes the following contention:

"Considered as an original claim for refund, the claim for 1917 filed on November 28, 1927, of course would have no legal effect, for it was filed more than four years after 1920, the date on which the last of the taxes for 1917 had been paid. *United States* v. *Andrews,* 302 U. S. 517; *United States* v. *Garbutt Oil Co.,* 302 U. S. 528. It also could not be treated as an amendment to an earlier filed claim for 1917, for such claim had theretofore been definitely disposed of either by its allowance in the schedule of refunds and credits signed by the Commissioner on October 11, 1926 (O. R. 51), or its putative disallowance by the act of the Commissioner in the same instrument of crediting part of the allowed overpayment against the deficiency for 1918 . . . "

In our preceding argument, we have considered the rejection of the 1917 claim of November 28, 1927 on February 28, 1928 as an outright disallowance of that portion of the original timely claims (R. Vol. I, p. 32) to which this suit relates.

Here, we submit to the Court, that even if the act of the Commissioner in making the credit constituted a rejection of the original claim to the extent of the $34,555.68, the respondent did not remain idle and permit the two-year period for bringing suit to expire without taking action. The claim for refund or payment of the $34,555.68 was filed on November 28, 1927, which clearly related back to the original claims, was, upon the great weight of authority, a request for a reopening or reconsideration of the original claims.

Since, therefore, the Commissioner accepted the claim of November 28, 1927, as a valid and proper claim, considered it on its merits and officially rejected it on February 28, 1928, the Circuit Court of Appeals held (1) that the original claim to the extent of the $34,555.68, had never been rejected until February 28, 1928 on the basis of all of the authorities cited

in the opinion on rehearing (R. Vol. II, pp. 76-77) and (2) that since this suit was brought on September 19, 1929 (R. Vol. I, p. 1) the action was timely brought under *Section 3226 of the United States Revised Statutes:*

Jones v. *United States*, 5 F. Supp. 146, 152
Mobile Drug Co. v. *United States* (D. C.), 39 F. (2d) 940
McKesson & Robbins, Inc. v. *Edwards* (C. C. A.), 57 F. (2d) 147
Ford Motor Co. v. *United States* (Ct. Cl.), 3 F. Supp. 423
Hickman v. *United States* (D. C.), 47 F. (2d) 328
Southwestern Oil & Gas Company v. *United States*, 29 F. (2d) 404, 406, certiorari denied, 280 U. S. 601
Pacific Mills v. *Nichols*, 72 F. (2d) 103, 107.

In the case of *United States* v. *Memphis Cotton Oil Company*, 288 U. S. 62; 53 S. Ct. 278, this Court held (1) that where a claim for refund was defective it might be amended even after the statute of limitations had run against the filing of a new claim or the rejection of an old one and (2) that if the Commissioner accepted the latter claim and considered it on its merits the period within which suit could be brought began to run upon the Commissioner's final consideration and rejection. In the course of that opinion Mr. Justice Cardozo said:

" . . . This is far from saying that there was the presentation of a new claim and not the perfecting of an old one when the gaps were filled thereafter.

. . . . . .

"The line of division must be kept a sharp one between the function of a statute requiring the presentation of a claim within a given period of time, and the

function of a regulation making provision as to form. The funcion of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, *what is before him is not a double claim, but a claim single and indivisible, the new indissolubly welded into the structure of the old. . . .*" (Italics supplied.)

It is perfectly clear on the facts of the case at bar and upon all of the foregoing authorities that the case at bar is clearly distinguishable from the case of *United States* v. *Andrews, supra*, and *United States* v. *Garbutt Oil Company*. In the Andrews case the facts in regard to the claim and the attempted amendment, as stated by Mr. Justice Roberts, were as follows:

"The claim here was not general but specific. . . . it pointed to two specific items of deduction which had not been taken and to which the taxpayer claimed to be entitled. . . . It was ascertained that litigation was in process upon the outcome of which would depend a decision as to the alleged worthlessness of some of the shares in question. . . . "While matters were in this posture, and after the period of limitation had expired, the respondent presented a so-called amendment of her claim having no relation whatever to the items set forth in the original claim but dealing with a wholly distinct item of $36,750 reported as dividends received and asking that it be eliminated from that category and that

> the transaction be reclassified as capital gain upon a basis which would result in a reduction of tax by some $6,000. This is not a case where the Commissioner waived the regulation with respect to the particularity with which the grounds of the claim must be set forth. There was no need for him to do so. The claim was not general like that in the Memphis Cotton Oil Case and the others following in its train. . . . "

It is respectfully submitted, therefore, that the holding of the Circuit Court of Appeals to the effect that the Commissioner's conduct with respect to the claim of November 27, 1928, as constituting a reopening or reconsideration of an original timely claim, is sound and supported by the great weight of authority and that the cases of *United States* v. *Andrews* and *United States* v. *Garbutt Oil Co., supra,* upon which the Government relies are clearly not in point as they are so obviously distinguishable upon the facts. In both of those cases, the taxpayer not only permitted either the five-year period after payment, or the two-year period after disallowance of the claim, to expire, the attempted amendment in both of those cases was a complete transfiguration or departure and had no relationship whatsoever to the grounds asserted in the original claim. No such situation as that exists in the case at bar.

On the second issue therefore, we have shown (1) that as a matter of fact the respondent filed proper and timely claims for refund for the year 1917 (2) that as a matter of law the respondent, as petitioner below, fully complied with the statutes in so far as the allegations of the petition and the claims for refund are concerned (3) that this suit is not based on a special assessment claim or the Commissioner's refusal to grant special assessment under Section 210 of the Revenue Act of 1917 and (4) that the claim for refund for the year 1917 filed on November 28, 1927, was not a new

claim nor was it based on different grounds from those stated in the original timely claim.

It is respectfully submitted, therefore, that the Circuit Court of Appeals did not err in holding that the respondent filed a timely and proper claim for refund for the year 1917 and brought the suit within two years thereafter as required by *Section 3228* and *Section 3226 of the United States Revised Statutes*, respectively.

As to the third issue.

III.

THIS COURT SHOULD NOT HOLD AND RULE THAT WHENEVER A COLLECTOR OF INTERNAL REVENUE MAKES A WRONGFUL AND EXCESSIVE COLLECTION OF A TAX FOR ONE YEAR AND THE COMMISSIONER OF INTERNAL REVENUE WRONGFULLY CREDITS THAT SUM AGAINST AN OUTLAWED TAX FOR ANOTHER YEAR, WITHOUT THE TAXPAYER'S CONSENT, THEN AND IN THAT EVENT THE TAXPAYER'S ONLY REMEDY IS A SUIT FOR SUCH SUM AS A TAX FOR THE YEAR TO WHICH THE CREDIT IS MADE.

Both in this case and in the case of *United States* v. *Jaffray et al*, No. 437, which is to be argued immediately following this case, the Government argues for an arbitrary, restrictive and unreasonable rule from this Court to the effect that, whenever the Commissioner of Internal Revenue wrongfully and illegally credits an excessive collection for one year against outlawed taxes for another year, then the taxpayer cannot bring a suit in any form or in any Court for the recovery of a tax for the year of the wrongful collection, but must bring the suit for a tax with respect to the year to which the credit is made, regardless of the fact that the Commissioner of Internal Revenue made such credits after the applicable statute of limitations had run and notwithstanding the fact that *Section 609 of the Revenue Act of 1928* (p. 54, *infra*) expressly declares such credits to be void. This proposition is stated in the Government's brief (p. 25) as follows:

"B. The credit or part of the overpayment for 1917 against taxes assessed for 1918 precludes suit for the year 1917."

Under such a rule the right of the taxpayer to avail himself of the economy, convenience and other benefits which were obviously intended under *Section* 24(20) *of the Judicial Code as amended,* would be even further limited, circumscribed or restricted than has ever been done by this Court or by any other Court, as is shown by the fact that the Government does not cite a single case in support of its proposition. Such a rule would operate as an extreme hardship upon taxpayers in general and would only add to the great confusion and conflict which already exist among the decisions in a large number of cases involving taxes which have been overpaid for one year and have, without the consent of the taxpayer, been erroneously credited by the Commissioner of Internal Revenue to outlawed taxes for other years. Such a holding by this Court would not only deprive the taxpayer of his right to protest against an illegal collection before it was made but it would completely deprive him of his common law right of action for "money had and received", against the Collector of Internal Revenue who exacted the wrongful payment and force all taxpayers, under such circumstances, to incur the great expense and inconvenience of taking themselves and their witnesses to Washington in order to prosecute their suits in the Court of Claims. The utter fallacy and injustice of such a rule, *where the credit is outlawed and "void",* was clearly illustrated in the case of *United States* v. *Jaffry* in the Circuit Court of Appeals, thus:

" . . . Suppose a taxpayer makes a cash overpayment of his 1935 tax, which the Commissioner credits to a deficiency for 1928. If the argument in the appellant's brief be sound, the taxpayer would then have to

sue for 1928. Suppose he does so, but that then the Commissioner decides that he was mistaken, that there was no tax due for 1928, instead determines a deficiency for 1931, 'reverses' the previous credit, and applies the 1928 overpayment to 1931. Under the Government's theory the taxpayer would then have to drop his suit for 1928 and begin all over again for 1931. The process of reversal, dismissal, and new suit could go on forever. . . . "

Lastly, such a rule would be so arbitrary, capricious and unreasonable as to defeat the whole purpose and intent of *Section* 24(20) *of the Judicial Code, as amended, by the Act of February* 3, 1925 (p. 51, *infra*), a statute which, we respectfully submit, should be liberally construed in favor of the taxpayer since the extension of the jurisdiction of the District Courts under that section intended primarily for the benefit of the taxpayer as has clearly been shown by numerous decisions of this Court.

In the case of *Christie-Street Commission Co.* v. *United States,* 136 F. 326, 329–330, Judge Sanborn for the Circuit Court of Appeals for the Eighth Circuit, in construing the original Act of 1887, *supra,* said:

"The acts of 1855 and 1887 here under consideration mark a rational and gratifying advance in civilization and public policy, and they should be liberally construed to accomplish the benign purpose of their enactment. The theory that a nation or its government should refuse to submit its controversies with its citizens to the adjudication of impartial tribunals is but the fast receding echo of the rule that the King can do no wrong. There are few more grievous wrongs than the denial by a nation of a hearing and trial of the just claims which its citizens may have against it. There is no reason why a government should not submit its controversies with

its subjects to adjudication, or why it should not itself practice that justice whose administration is the great purpose of its existence. Justice demands, and a wise public policy requires, that nations should submit themselves to the judgment of impartial tribunals, to the enforcement of their contracts and to satisfaction of their wrongs, as universally as individuals."

In the case of *United States* v. *Emery, Bird, Thayer Realty Company*, 237 U. S. 28; 35 S. Ct. 499, the Government argued that the taxpayer's only remedy for an illegally collected tax was a suit against the Collector of Internal Revenue and that the Court of Claims did not have jurisdiction. In overruling the objections, Mr. Justice Holmes said:

"The objection to the jurisdiction pressed by the government is that the only remedy is a suit against the collector. As the United States has received and keeps the money, and would indemnify the collector if he had to pay (Rev. Stat. No. 3220, Comp. Stat. 1913, No. 5944), the least that can be said is that it would be adding a fifth wheel to the coach to require a circuitous process to satisfy just claims. It is true that this tax law provides that 'all laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable,' etc., are extended to this tax (No. 38, 36 Stat. at L. 117, Chap. 6), *but that is far from the case of a statute creating a new right and a special remedy to enforce it in such form as to make that remedy exclusive. The right to sue the collector for an unjustified collection was given by the common law. . . .* However, gradually the result may have been approached in the earlier cases, it now has become accepted law that claims like the present are 'founded upon' the revenue law. The argument that there is a distinction between claims 'arising under' (Judicial Code, No. 24, first) and those

'founded upon' (id. No. 24, twentieth) a law of the United States *rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye.*" (Cases cited.) (Italics supplied.)

In the case of *Bates Manufacturing Company* v. *United States,* 303 U. S. 567; 58 S. Ct. 694, this Court put a much broader and more liberal interpretation upon *Section* 24 (20) *of the Judicial Code* than that for which the Government here contends. In that case Mr. Justice Black said:

"The substantial rights of claimants are to be governed alike whether suit is brought in the Court of Claims or the District Court. The author of the Tucker Act in declaring the statute of limitations applicable alike 'to any or all' of the cases arising under the Act drew no distinction between suits brought in the District Court and in the Court of Claims.

"The purpose of giving the District Courts concurrent jurisdiction with the Court of Claims was to provide additional opportunity for the consideration and determination of claims that had 'long pressed upon the consideration of Congress' and to permit suit to 'be brought in the District where the parties reside. . . . '

. . . . . .

" . . . *The erection of barriers to recover in the District Courts which did not exist in the Court of Claims would have tended to defeat the prime objectives of the Act.* Uniformity and equality in substantial rights and privileges—for claimants in both forums—were essential features in the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation. As to substantial rights, Congress evidently meant to give

claimants an identical status in both Courts where the amount in controversy was included in the jurisdiction of both. . . . " (Italics supplied.)

It is thus clear that the rule for which the Government is contending would be contrary to the whole purpose and intent of the Tucker Act ,as well as the amendment. Moreover, such a holding is entirely unnecessary in so far as the consideration of this case on the merits is concerned. As to the third issue, therefore, it is respectfully submitted, therefore, that this Court should not hold and rule that whenever a Collector of Internal Revenue makes a wrongful and excessive collection of a tax for one year and the Commissioner of Internal Revenue credits the sum thus collected against an outlawed tax for another year without the taxpayer's consent, then the taxpayer's only remedy is a suit for such sum as a tax fax for the year to which the credit is made.

As to the fourth issue:

IV.

AS A MATTER OF LAW, EQUITY AND GOOD CONSCIENCE, THE GOVERNMENT WAIVED THE RIGHT TO RAISE ITS SO-CALLED JURISDICTIONAL OBJECTION IN THE APPELLATE COURTS BY VIRTUE OF THE FACT THAT IT APPEARED, PLEADED AND EXPRESSLY ADMITTED ALL OF THE FACTS NECESSARY TO SUSTAIN THE JURISDICTION OF THE DISTRICT COURT.

We are not unmindful of the sovereign immunities of the Government, of the fact that it can be sued only on its own terms and of the general rule to the effect that an objection to the jurisdiction of a Court may be raised at any stage of the proceeding. It is equally true, however, that the United States can just as an individual submit itself to the jurisdiction of the District Court and that the rule with respect to the objection to the jurisdiction of the Court does not apply where the Court has inherent jurisdiction of the subject matter. In this case the Government's objection is

not based on the ground that the District Court did not have jurisdiction of the subject matter. It is based solely on the form of the action, the nature of the plaintiff's claim or on matters of fact which could have been pleaded and proved or disproved in the District Court. This we submit is a case where the District Court did have inherent jurisdiction of the subject matter under *Section* 24 (5) *of the Judicial Code, as amended,* which provides as follows:

> "The District Courts shall have original jurisdiction . . . of all cases *arising under any law providing for internal revenue.* . . . "

Moreover, the *Act of March* 3, 1887, c. 359; 24 Stat. 506; 28 U. S. C. 763 (p. 50, *infra*) invests the Attorney General of the United States and the District Attorney upon whom the petition is served with full authority to represent the United States and requires them "to file a plea, answer or demurrer on the part of the Government and to file a notice of any counter-claim, set-off, claim for damages or other demand or defense whatsoever of the Government in the premises". Under these circumstances, therefore, the respondent submits that since the United States did appear by its duly qualified officers and admit the jurisdiction of the District Court, the Government should be bound by those admissions just as any other litigant would be bound if he accepted the jurisdiction of any Court which is invested with inherent jurisdiction over the subject matter. Especially should this Court so hold in this case, because as has been pointed out, the Government's objection in its final analysis does not deal with real jurisdictional issues but is based upon matters of fact, all of which could have been pleaded and proved, if they were true, and, we submit, should have been timely pleaded in the District Court. The mere fact that the objection is called a jurisdictional one does not and cannot

change the nature of facts upon which the asserted objection rests.

In the case of *Primos Chemical Company* v. *Fulton Steel Corporation,* 254, Fed. 454, 458, the Court said:

> "Questions of jurisdiction in the United States courts are not free from perplexities . . .
>
> . . . . . .
>
> "There is such a thing as jurisdiction of the person which can be given by consent of the defendant, he waiving his right to be sued in a given district, and there is such a thing as jurisdiction of the subject-matter of the suit, which cannot be conferred on any court by either assumption of jurisdiction or by consent of the parties, or of either or any of them, or by request of all the parties to the suit." (Cases cited.)

In the case of *Howbert, Collector* v. *Penrose,* 38 F. (2) 577, 581, the Government failed timely to raise an objection to the sufficiency of the claim for refund, and based its objection on jurisdictional grounds when it was too late for the taxpayer to remedy the defect. In that case, as in the case at bar, the objection was raised only by way of argument and was not pleaded. The Court overruled the objection of the Government because the issue had not been raised in its answer and said:

> "If the defendant had challenged the sufficiency of the claim by his answer, the plaintiff had abundant time to supply the deficiency by a new or an amended claim. When the point was first raised at the trial in October, 1928, both periods of limitation had expired.
>
> "The question is not free from doubt, but on the whole, we are of the opinion that the sufficiency of the claim for refund was not put in issue, and that the plaintiff is entitled to recover this tax. The defendant con-

cedes that he is entitled to it on the merits; and while 'men must turn square corners when they deal with the Government' (*Rock Island, etc., R. Co.* v. *United States,* 254 U. S. 141, 41 S. Ct. 55, 65 L. Ed. 188), *the government ought to turn square corners when dealing with its citizens. There is another maxim applicable in both of these appeals, and that is the substance should be given the right of way over form. Eisner* v. *Macomber,* 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570; *Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170, 46 S. Ct. 449, 70 L. Ed. 886.

"The claim for refund should have been more particular; *but if the defendant expected to avoid the repayment of this illegally collected tax on that account, he should have been more particular in his answer.* The derelictions of the parties are about equal, and if the matter is at large, *the tax ought to be repaid, for concededly the government has no right to it.*" (Italics supplied.)

In the case of *Tucker* v. *Alexander,* 275 U. S. 228; 48 S. Ct. 45, 46, this Court, through Mr. Justice Stone, said:

"Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before a suit is brought for a tax refund may be insisted upon by the defendant, whether the collector or the United States. (Cases cited.) But no case appears to have held that such objections as that urged here may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is in-

sisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose. We are not unmindful of those cases holding that in suits against the Government no officer of the government may waive statutes of limitations. *Finn* v. *United States*, 123 U. S. 227, 8 S. Ct. 82, 31 L. Ed. 128."

In the case of *Naumkeag Steam Cotton Co.* v. *United States*, 2 Fed. Supp. 126, 133, Chief Justice Booth of the Court of Claims invoked the doctrine of estoppel as laid down in the case of *Dickerson* v. *Colgrove*, 100 U. S. 578, 580; 25 L. Ed. 618, in which Mr. Justice Swayne of this Court said:

> "'The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. *Such a change of position is sternly forbidden . . . There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on.* The rule does not rest on the assumption

that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.'

"The relief of equitable estoppel is administered in favor of one who has been induced to alter his line of conduct with respect to the subject matter in controversy so as to have foregone some right or remedy which he otherwise would have taken. *Under the doctrine of equitable estoppel, a person is held to a representation made or a position assumed, where otherwise inequitable consequence would result to another, who having the right to do so under all circumstances of the case, has, in good faith, relied thereon.*" (Italics supplied.)

In the case of *United States* v. *Hvoslef, et al.*, 237 U. S. 1; 35 S. Ct. 459, 462, which was a suit involving illegally collected revenue taxes, this Court affirmed the judgment of the District Court, overruling the Government's demurrer. Mr. Justice Hughes said:

"Another objection to the jurisdiction of the district court is that under par. 5 of the Tucker act . . . the suit was to be brought 'in the district where the plaintiff resides.' . . . It is said that the allegation was insufficient to show the residence required by the statute, but it does not appear that any such objection was made in the court below. The general language of the demurrer with respect to jurisdiction had appropriate reference to the general authority of the court to entertain such a suit against the United States and to the jurisdiction of the subject-matter of the action. But assuming that the subject-matter was within the jurisdiction of the court, the requirement as to the particular district within

which the suit should be brought was a *modal and formal one, which could be waived*, and must be deemed to be waived in the absence of specific objection upon this ground before pleading to the merits. . . . " (Cases cited.) (Italics supplied.)

In the case of *Guaranty Trust Company of New York* v. *United States*, 304 U. S. 126; 58 S. Ct. 785, the United States appeared, pleaded and, to all intents and purposes, substituted itself for the Russian Government. After an adverse judgment had been rendered, however, the Government contended that the District Court was without jurisdiction. This Court held that when it came in and submitted to the jurisdiction of the District Court, as has been done in the case at bar, it thereby relinquished its sovereign immunity and became subject to all of the rules of the Court which are applicable to any individual suitor. In the course of the opinion Mr. Justice Stone said:

"By voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. *Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act.* *United States* v. *The Thekla*, 266 U. S. 328, 340, 341, 45 S. Ct. 112, 113, 69 L. Ed. 313; *United States* v. *Stinson*, 197 U. S. 200, 205, 25 S. Ct. 426, 49 L. Ed. 724; *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *The Siren*, 7 Wall. 152, 159, 19 L. Ed. 129. As in the case of the domestic sovereign in like situation, those rules, which must be assumed to be founded on principles of justice applicable to individuals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts." (Italics supplied.)

In the case of *Lowe Brothers Company* v. *United States*, *supra*, in interpreting the amendment of *Section* 24 (20) *of the Judicial Code*, 28 U. S. C. A. 41 (20) Mr. Justice Stone said:

> "The obvious purpose of the amendment was to permit a substitution of a suit against the United States for the suit previously allowed against the collecter whenever the amount claimed exceeds $10,000 and the collector is out of office. . . . "

We interpret this language to mean that whenever the United States appears and answers in the District Court to a petition filed under the amendment, it is shorn of all its sovereign immunities and appears in the personal capacity of the Collector who, as any other individual litigant, could submit himself to the jurisdiction of any Court which has inherent jurisdiction of the subject matter. If such individual appears and answer to the merits of the case without raising any question as to the jurisdiction of the Court over his person, all other objections which do not go to the inherent jurisdiction of the Court are universally held to be waived. If this be true the United States in the personal capacity of the Collector has not only waived its right to object to the jurisdiction of the District Court but is estopped to deny such jurisdiction (1) by its answer, (2) by the admissions made in open Court and (3) by its assent in the bill of exceptions to the effect that "all requisite conditions precedent to the bringing of its petition were complied with by the petitioner".

As to the fourth issue, therefore, it is respectfuly submitted, that as a matter of law, equity and good conscience the Government waived the right to raise its so-called jurisdictional objection by its conduct in the District Court and cannot raise it for the first time in the Appellate Court.

CONCLUSION.

The United States has not been prejudiced in any manner by reason of the fact that the respondent's claim was brought and heard in the District Court instead of in the Court of Claims. The case has been thoroughly and fairly adjudicated. Every issue raised by the Government in those courts was carefully considered in two decisions of the District Court and in three decisions of the United States Circuit Court of Appeals. The original petition contained all of the necessary jurisdictional averments which were expressly admitted or assented to by the Government. Throughout the entire presentation of its case in the various courts below, the respondent, as petitioner below, relied upon those admissions in good faith. When the so-called jurisdictional objection was first raised at the second hearing in the Circuit Court of Appeals, the respondent was not only taken completely by surprise but realized that it had been completely misled and deceived. Since none of the objections were raised in the District Court and all of the necessary jurisdictional facts were expressly admitted the objections were not properly raised in the Circuit Court of Appeals and are not properly raised in this Court. The Government itself concedes that the taxes in controversy were wrongfully collected for the year 1917 and that they were wrongfully credited by the Commissioner of Internal Revenue against outlawed taxes for 1918. It is inequitable for the Government to attempt to disregard and repudiate its own admissions as is being attempted in this case. A great and unconscionable injustice will be inflicted upon this respondent if the Government is allowed to prevail.

The respondent respectfully submits, therefore, (1) that the District Court did have jurisdiction of the case, (2) that the Circuit Court of Appeals did not err in sustaining the

judgment of the District Court and (3) that the decision of the Circuit Court of Appeals should be affirmed by this Honorable Court.

Respectfully submitted,

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APPENDIX.

Act of March 3, 1887, c. 359, 24 Stat. 506
Section 5; 28 U. S. C. 762.

"762. PETITION IN SUIT AGAINST UNITED STATES.—The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

Section 6; 28 U. S. C. 763.

"763. SAME; SERVICE; APPEARANCE BY DISTRICT ATTORNEY. The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case *to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any* counterclaim, setoff, claim for damages, or *other*

demand or defense whatsoever of the Government in the premises. . . ." (Italics supplied.)

United States Judicial Code, as amended,
Section 24 (5); 25 U. S. C. 41 (5); 36 Stat. 1092

"*Section* 41. (JUDICIAL CODE, SECTION 24, AMENDED.) ORIGINAL JURISDICTION. . . . The District Courts shall have original jurisdiction as follows:

. . . . . .

"(5) CASES UNDER INTERNAL REVENUE, CUSTOMS, AND TONNAGE LAWS.

"*Fifth.* Of all cases *arising under any law providing for internal revenue,* or from revenue from imports or tonnage except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals. (R. S. No. 563, par. 5, No. 629, par. 4; Mar. 3, 1911, c. 231, No. 24, par. 5, 36 Stat. 1092.)" (Italics supplied.)

In the case of suits brought under the amendment to the Tucker Act, the Act itself invests the Attorney General of the United States and the District Attorney upon whom the petition is filed with full authority to represent the United States and requires them to file the necessary pleading, 28 U. S. C. 762, 763. The Statute provides:

Section 24 (20); 28 U. S. C. 41 (20); 43 Stat. 972

"*Section* 41. (JUDICIAL CODE, SECTION 24, AMENDED.) ORIGINAL JURISDICTION . . . The District courts shall have original jurisdiction as follows:

. . . . . .

"(20) SUITS AGAINST UNITED STATES . . . Twentieth. Concurrent with the Court of Claims . . . of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally

assessed or collected, or of any penalty claimed to have been collected without authori y or of any sum alleged to have been excessive or in a"y manner wrongfully collected under the internal revenue laws even if the claim exceeds $10,000 if the collector of internal revenue by whom such tax, penalty or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced . . . No suit against the Government of the United S'ates shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made."

United States Revised Statutes, as amended
Section 3226; 26 U. S. C. 156

"156. SUITS FOR RECOVERY OF TAXES WRONGFULLY COLLECTED.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, . . . No such suit or proceeding shall be begun . . . after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 3228; 26 U. S. C. 157

"157. CLAIMS FOR REFUNDMENT; LIMITATIONS.—(a) All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have

been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 1065 of this title, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. . . ."

Revenue Act of 1921, 42 Stat. 227

"SEC. 250. . . .

(d) The amount of income, excess-profits, or war profits taxes due under any return made under this Act for the taxable year 1921 . . . or under prior income, excess-profits or war-profits tax Acts, . . . *shall be determined and assessed* within five years after the return was filed, . . . unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax: . . . (Italics supplied.)

Revenue Act of 1924, c. 234, 43 Stat. 253:

"SEC. 277. (a) . . .

(2) The amount of income, excess-profits, and war-profits taxes imposed by . . . the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, *shall be assessed within five years after the return was filed,* and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period." (Italics supplied.)

"SEC. 278. . . .

(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment, the tax may be asessed at any time prior to the expiration of the period agreed upon."

Revenue Act of 1928, 45 Stat. 874; 26 U. S. C. 2607 and 2609:

"SEC. 607. Effect of expiration of period of limitation against United States: Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

Section 609; 26 U. S. C. A. § 2609:

"SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act."